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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

TRINITY INDUSTRIES, INC.,
Petitioner,

v.

FOREST HENRY SHIPES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS FOREST HENRY SHIPES, ET AL., IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it is an abuse of discretion for a trial court to find that there are common questions of law or fact in a Title VII class action involving two related plants with the same entirely subjective employment practices, where those practices are shown to have resulted in racial discrimination against the named plaintiff and members of the class at both plants.

2. Whether the trial court abused its discretion in adopting the backpay remedy in this case.

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OPINIONS BELOW

In addition to the opinions included in the appendix to the petition for writ of certiorari, the district court's memorandum opinion on liability, dated October 10, 1985, and its order on damages dated, July 29, 1991, contain findings of fact and conclusions of law that are relevant to this Court's decision as to whether or not to grant the writ. The former is reported as *Shipes v. Trinity Industries, Inc.*, 40 Fair Emp. Practice Cas. 1136 (E.D.Tex., 1985), and is set forth in the appendix to the brief of Respondent at A-1 to B-1. The latter is unreported, and is set forth in Respondent's Appendix at B-1 to B-9.

STATEMENT OF THE CASE

Trinity Industries, Inc., a manufacturer of railcars and structural steel products, operates over thirty production facilities in 13 states. Two of its railcar manufacturing facilities are located in Longview, Texas. The majority of workers at both plants are welders or welder's helpers (Resp. App. A-14). Respondent Forest Henry Shipes, a black male, was employed at one of these facilities as a welder's helper. He claimed that he personally was discriminated against in decisions concerning his initial job placement, pay, promotions, and layoff, because of Trinity's practice of allowing decisions as to all of these matters to be made in an entirely subjective fashion by its all-white supervisory force. He challenged this practice under both the "disparate impact" and the "disparate treatment" theories of discrimination under Title VII. (Resp. App. A-32 - A-33).

The trial court's order on class certification (Pet. App. B-1), issued on July 30, 1982, permitted Shipes to represent a class composed of all black employees of Trinity's two Longview plants. The trial court recognized that its decision on class certification at that early stage of the litigation was necessarily based on limited information and tentative, and that it could be revised in light of later developments (Pet. App. B-9). Trinity subsequently filed motions to dismiss the West Longview plant from the action and to decertify the class for various other reasons.

After trial of the liability issue in late 1984, the trial court reconsidered its class certification decision in light of all the evidence. Petitioner has unaccountably failed to include in its appendix the trial court's memorandum opinion on liability, dated October 10, 1985 (Resp. App. A). In this decision, contrary to Petitioner's contention (Pet. at 5) that the trial court "refused to reconsider its July 29, 1982 Order or to limit the class in any way," the trial court discussed all of the grounds for decertification that Trinity had raised and narrowed the class to exclude salaried employees. The class as finally certified included only black hourly employees at both plants from January 10, 1980 to April 1, 1984 (Resp. App. A-3-A-11). However, the court did not change its order with respect to the only issue that Petitioner has raised here and with the Court of Appeals—that of the commonality of Shipes' claims with those of class members at the West plant.

The trial court found that the personnel practices at both plants in the areas of initial placement and pay, promotion, and layoff were entirely subjective and virtually identical. Although the hourly workforce was approximately 20% black, only one black ever held a supervisory position at either plant.[1] There was no posting of job vacancies, either for initial hire or for promotion (Resp. App. A-22). The screening of candidates for employment was left entirely up to the subjective discretion of the personnel manager (Resp. App. A-23 - A25). Initial placement and pay decisions were based on a subjective assessment of employees' abilities (*Id.*). Such written job descriptions as did exist at both plants were similar (Pet. App. B-17; Resp. App. A-5), but they were so vague and subjective as to provide no actual guidance in placement or promotion decisions (Resp. App. A-16 - A-22). Many of the job titles at both plants were virtually meaningless as descriptions of the work actually performed (Resp. App. A-21 - A-22). Welding tests were administered in so random a fashion as to be meaningless (Resp. App. A-32). "Promotions" at both plants were synonymous with pay raises. At both plants, they were left to the foreman's unreviewable, subjective discretion, without meaningful guidelines (Resp. App. A-39 - A-41). There was no written evaluation procedure at either plant during virtually the entire class period (Resp. App. A-40). Layoff decisions were made in the same fashion at both plants—by an all-white supervisory force, according to subjective judgments, without any objective criteria or guidelines (Resp. App. A-48 - A-49).

The trial court also found as a factual matter that the employment system in effect at both plants resulted in disparate treatment of black employees in initial placement, pay, and layoff decisions (Resp. App. A-35, A-37, A-54 - A-55, A-71). Following Fifth Circuit precedent that was in effect prior to this Court's decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), the trial court did not analyze Respondents' claims under the disparate impact model, because they involved the use of subjective criteria.

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[1] The single black supervisor was not promoted until May, 1983—well after this litigation had begun (Resp. App. A-7, n. 18).

In making its findings of classwide discriminatory treatment, the trial court relied on the same type of evidence for both plants. In particular, most of the statistical models that both sides used to demonstrate or refute that there was racial discrimination were identical for the two plants. The same experts testified regarding all the statistical evidence and regarding the subjectivity of Defendant's practices; and many individual witnesses testified as to conditions at both plants. The same injunctive relief was decreed for both plants.

The trial court also found that the two plants were not, as Trinity contended, "separate and autonomous," but that, "as a factual matter, the plants are related in crucial ways" (Pet. App. B-16; Resp. App. A-4 - A-7). The linkages that the trial court found were not, as petitioner suggests here, limited to the maintenance of common employee group benefits programs. During most of the class period, the two plants produced the same product, railroad tank cars. The plants were managed by the same individual from 1982 to the end of the class period. Management and supervisory personnel were transferred between the plants, including the personnel manager from the West plant, who moved to the East plant in February 1982 and remained there for the rest of the class period. There were coordinated transfers of hourly production workers between the two plants.

The employment handbook was the only written document formulating management policies and procedures at the two plants, and it was common to both. Both plants used the same forms for applications, pay increases, layoffs, and discharges. General salary increases and changes in shift differentials took effect on exactly the same dates at both plants.

After finding that Petitioner practiced discrimination against the named plaintiff and other black employees in initial placement and pay and layoffs at both plants, and as well in promotions and discharges at the East plant, the trial court requested that the parties brief the issue of remedies. Both sides advocated using a formula obtained from multiple regression analysis to calculate back pay awards.

A formula approach to the determination of back pay was desirable because of the trial court's findings that Petitioner's employment system relied on subjective, standardless decision- making and that its job classifications were fungible. Rather than being hired into a specific vacancy with clear, predetermined required qualifications, employees were assigned a job classification and pay level based on the preferences of the personnel director or foreman. Job descriptions were vague and unhelpful (Resp. App. A-16 - A-20). In the context of this system, Petitioner discriminated against black employees by tending to place them in lower-paying positions than whites with the same or lower qualifications (Resp. App. A-25; A-35; A-37).

After reviewing the parties briefs on remedies, the court appointed an independent expert to develop a damage model. The court-appointed expert used multiple regression analysis to arrive at a statistical estimate of what each particular class member would have received at hire if he had been treated the same as white employees *with the same experience and qualifications* (including months of pre-hire experience in different types of jobs, educational background, trade school training, and other factors). The starting pay rate for whites that was used for comparison was not simply, as Petitioner asserts, "the mean of all the actual starting rates for whites" (Pet. 6). It was, rather, the statistical equivalent of the mean of the starting rates for whites *with the exact qualifications of each individual black class member.* If a class member was paid less than this amount, he was awarded back pay equal to the difference between this amount and his actual pay. If he was paid more than the average pay rate of white employees with his qualifications and experience, he did not receive an award. Thus, the estimate of what each black employee would have been paid if he had been treated the same as whites with the same qualifications served both as a triggering mechanism, signaling entitlement to an initial pay award, and as a measure of damages. These calculations were done separately for each class member, and the amount that any class member was paid did not affect the amount that any other class member received in back pay.

Petitioner's own expert testified that, *for each individual black employee, the best estimate of what he should have been paid, if treated the same as an equally-qualified white, was the estimate that*

the court in fact used. This was also the testimony of the court-appointed expert. (Pet. App. C-2).

The court-appointed expert presented a preliminary damage model to the trial court at a hearing on December 18, 1990. Petitioner objected to the model because of its focus on compensating individual class members who were paid less than whites with the same qualifications. Petitioner insisted that the court should instead adopt a remedy which insured that black employees as a group were paid an amount equivalent to the amount that was paid to whites as a group. According to Petitioner, each black employee would receive an equal share of the class-wide award, regardless of his own qualifications and regardless of how he was actually treated relative to whites with his qualifications. Thus, blacks who were paid more than the average for whites with equal qualifications would receive the same amount as those who were paid much less. Only differences in length of employment would cause awards to vary among class members.

In an order dated December 27, 1990, which specified the general approach that was to be used to develop the final damage model (Pet. App. C-1), the trial court rejected the Petitioner's argument. It held that the proper focus of the remedy phase of an employment discrimination class action was on identifying each individual claimant's relationship to the employment practices that had been held, in the liability phase, to have violated Title VII. Since both the court-appointed expert and Petitioner's own expert had testified that the court-appointed expert's model was the most accurate method of determining the extent to which each class member had been damaged by discrimination (Pet. App. C-2), the court adopted it in preference to Petitioner's suggested approach.

As the final damage model was developed, the Petitioner continued to urge its objection. Respondent pointed out, however, that the class-based damage model proposed by Petitioner resulted in a much smaller award to the plaintiff class than the individualized approach used by the court-appointed expert, because it in effect deducts amounts that some black employees were "overpaid" by Petitioner from the award to class members who suffered economic harm. The reason for this can be seen in connection with the example given in the

Petition at 9, involving damages awarded to five hypothetical black employees after comparing them to five whites. First, it must be noted that, under the model the trial court adopted, all of these employees had identical pre-hire qualifications—months of welding experience, trade school training, education, and other relevant background characteristics. The best estimate of what the five equally-qualified blacks would have earned in the absence of discrimination was $7—the average of the salaries of the equally-qualified whites. The trial court awarded the three blacks who earned less than this amount the difference between $7 and their actual salaries. One of the five blacks earned more than the mean for whites with these qualifications. Under the model adopted by the trial court, this employee did not receive an award, because he was not underpaid. The amount that he was paid did not affect the awards to the other four.

Under the approach advocated by Petitioner, the amount by which this one employee was "overpaid," relative to whites with his qualifications, was deducted from the amount awarded to the group, to make sure that blacks as a group did not end up receiving more than whites as a group. The effect of this on the overall award to the class was substantial. Though only a relatively small number of blacks were overpaid, the damage model multiplied salary by length of time employed. Thus, an "overpayment" to a single long-term black employee could wipe out awards to several short-term black employees. Indeed, under the alternative calculations submitted by Petitioner in the trial court, there would be no award to employees discriminated against in initial pay at the West plant, in spite of the unchallenged finding that such discrimination had occurred.[2]

In an order on the damage model dated July 29, 1991 (Resp. App. B-1), the trial court further elaborated upon its reasons for rejecting

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[2] However, since this was not the only difference between the model proposed by Petitioner and the one adopted by the trial court, it is not possible to tell how much of the reduction in the award to West plant employees was due to this factor.

Petitioner's approach.[3] First, it noted that Petitioner's proposal rested on the unfounded assumption that each class member was impacted equally by Petitioner's discrimination. It found that it was not reasonable to assume that each and every black class member was affected in an identical way. Further, it found that it would be unfair and contrary to the compensatory purpose of Title VII to reduce back pay to demonstrably underpaid class members because some class members were overpaid relative to equally-qualified whites.

On appeal, Petitioner claimed that the trial court had abused its discretion in finding that Shipes satisfied the commonality requirements of Rule 23(a) with respect to employees at the West Plant. The Fifth Circuit held that the district court's determination that the two plants used the same entirely subjective criteria in making employment decisions satisfied the commonality and typicality requirements of Rule 23(a). Noting the wide discretion afforded trial courts in connection with class certification decisions; and noting the fact that the trial court had found that white supervisors applied the same subjective criteria at both plants, that employees were transferred between plants, and that the plants shared administrative forms, employee handbooks, and insurance and retirement systems, the unanimous 5th Circuit panel held that the trial court had "clearly" not abused its discretion in including hourly West plant employees in the class.

By way of cross appeal, Respondents pointed out that, in light of the Supreme Court's intervening decision in *Watson*, *supra*, the district court should have analyzed the case under the disparate impact theory as well as the disparate treatment theory. However, since the appellate court affirmed the trial court on all of the liability issues, including class certification, it did not address this issue.

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[3] As was the case with the trial court's memorandum opinion on liability, Petitioner failed to bring this important order before this Court as an appendix to its petition for certiorari. At the same time, Petitioner faults the trial court for not articulating the reasons behind its decision (Pet. 14-15).

In addressing Petitioner's attack on the backpay remedy, the Fifth Circuit noted the exceeding complexity and uncertainty attendant on the process of fashioning a classwide backpay remedy, and the wide discretion afforded the trial court in this area. It found the trial court's individualized approach to be superior to the classwide remedy advocated by Petitioner, under such well-established Fifth Circuit precedents as *Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir., 1974), *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir., 1974), and *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir., 1975), *cert. denied*, 429 U.S. 817 (1976). Contrary to Petitioner's claim that the panel simply affirmed the trial court because it was "daunted by the size of the record in this case" (Pet. 10), the Fifth Circuit opinion indicated that the panel had carefully reviewed the record and the trial court's back pay remedy. The unanimous panel held that the remedy was not clearly erroneous.

ARGUMENT

1. Introduction

Petitioner contends that two questions are presented here: the propriety of an "across-the-board" class action, and the propriety of a damage allocation procedure that arbitrarily excludes some members from receiving damages and gives a windfall to other members of the class.

In fact, neither of these questions are presented on this record. Petitioner phrases both questions in sensational terms, to make it seem that the district court and the unanimous panel of the court of appeals acted in ways that are plainly forbidden by this Court's decisions and by the circuits that have followed those decisions.

The courts below in fact neither approved an "across-the-board" class nor adopted an arbitrary remedy. There is no disagreement among the circuits as to the law that applies to either of these questions. Essentially, the issues involved in this case are fact-bound disputes about how the district court should have exercised its discretion in defining the class and awarding damages, by applying standards about which the lower courts are in general agreement.

2. The class definition

Petitioner contends that, by including the employees at the West Longview plant in the class, the trial court in effect certified an "across-the-board" class action. Petitioner reasons that, since across-the-board class actions were condemned by the Supreme Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) the Fifth Circuit's decision affirming the trial court's order must conflict with *Falcon* and with cases in other circuits that have followed *Falcon*.

This argument rests on a fundamental mischaracterization of the trial court's certification order. The practice that was condemned in *Falcon* was that of relaxing the requirements of Rule 23 in Title VII actions. The Supreme Court held that it was error for a trial court to certify a class of people affected by unrelated aspects of the employer's personnel system, on the basis of an unsupported allegation of discrimination only in a particular aspect that system. It held that there must be a showing that the class representative's claim is in fact typical of claims of other class members, in order for a class certification decision to be justified.

Here, the trial court found, after extensive and detailed factual review both of the named plaintiff's individual claims and of the employment systems in place at both plants, that the individual claims were common to and typical of claims of black hourly employees at the West plant. It found that there had been significant proof of a general policy of discrimination at both plants, and that the discrimination was manifested by the entirely subjective decision-making processes in place at both plants. The holding of the Fifth Circuit was simply that tnese factual findings were sufficient to satisfy the commonality and typicality requirements of Rule 23.

The Fifth Circuit's affirmance represents a straightforward, and by now rather commonplace, application of the rules set forth in *Falcon*. The *Falcon* Court was concerned that the across-the-board rule ignored the conceptual gap between a mere claim that an individual had been victimized by discrimination, and the existence of a class of persons who had been victimized in such a way as to make the named

plaintiff's claim common and typical. The error inherent in the practice of certifying class actions based only on an individual's unsupported claim, without a more extensive showing of class-wide harm, was that it gave insufficient consideration to the actual commonality and typicality of the named plaintiff's claims. The Court was careful to point out, however, that class treatment was appropriate in those cases in which commonality and typicality had been demonstrated, as when there was significant proof of a general policy of discrimination, coupled with a showing that the policy manifested itself in different employment practices through entirely subjective decision making processes. *Id.* at 147, 159, n. 15.

Since *Falcon* was decided, the Fifth Circuit has consistently evaluated class certification orders according to its dictates. *See, e.g., Merrill v. Southern Methodist University*, 806 F.2d 600 (5th Cir., 1986); *Vuyanich v. Republic National Bank*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Redditt v. Mississippi Extended Care Center*, 718 F.2d 1381 (5th Cir., 1983). Certification orders have only been approved in cases where the facts indicated that the named plaintiffs had established the existence of employment practices that adversely affected the class in ways that made their claims common and typical. *See Richardson v. Byrd*, 709 F.2d 1016 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 617 (5th Cir., 1982).

The Fifth Circuit's rulings in this area are consistent with those of other circuits. *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir., 1986); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Wagner v. Taylor*, 836 F.2d 578, 590-594 (D.C. Cir., 1987); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 122-24 (3d Cir. 1985), *aff'd on other grounds*, 482 U.S. 656 (1987). There has been no controversy about the law in this area.

Although the propriety of an "across-the-board" class is not presented in this case, there is a second issue that is lurking in the petition. Petitioner asks this Court to reexamine *Falcon* and to announce a new rule of law: "that a plaintiff cannot meet the requirements of Rule 23(a), and that it is inherent error to certify an

across-the-board class action in a [illegible]rate treatment case, where the employment decisions affecting the plaintiff were made by different supervisors at a different plant than the decisions affecting the other purported class members" (Pet. 11).[4]

Even if the Court chose to adopt this unwarranted restriction on Rule 23 in Title VII cases, it would make no difference to the outcome of this case, in which the plaintiffs proved that Petitioner's entirely subjective employment system at both plants had a disparate impact on black employees there. In *Watson*, *supra*, this Court held that an employer's "undisciplined system of subjective decision making" could be attacked under a disparate impact theory. The impact of a subjective system is not dependent on the identity of the decision maker; it is the system itself that creates common questions. The findings of common practices at both Defendant's Longview plants that resulted in proven discriminatory impact would justify the certification decision here, even if a different rule were to apply in cases that were brought under only a disparate treatment theory.

The rule that Petitioner asks this Court to adopt lacks support in the post-*Falcon* jurisprudence. All but one of the cases cited by Petitioner on this point are cases in which the appellate courts found that the trial courts had not abused their discretion in delineating the scope of various classes, based on the particular facts involved in each case. *See Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566 (11th Cir., 1992); *Giles v. Ireland*, 742 F.2d 1366 (11th Cir., 1984); *Meadows v. Ford Motor Co.*, 510 F.2d 939 (6th Cir., 1975);

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[4] Petitioner does not say whether the Court should permit the certification of such actions when employment decisions are made by different supervisors in the *same* plant. If claims regarding subjective decision-making are inextricably tied to the identities of particular decision makers, it is difficult to see how class claims would ever be appropriate unless the same specific individual made all of the decisions for all of the class members. *See Green v. USX Corporation*, 843 F.2d 1511, 1533 (3d Cir. 1988), *vacated on other grounds*, 490 U.S. 1103 (1989), *aff'd in relevant part after remand*, 896 F.2d 801 (3d Cir.), *cert. denied*, 498 U.S. 814, (1990) (rejecting claim that subjectivity of system precluded class treatment because each employment decision was "unique.").

and *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir., 1975). The facts of these cases do not resemble those involved in this case, but, even if they did, the findings of no abuse of discretion by the trial courts involved would certainly not conflict with the appellate court's affirmance of the trial court in this case under the same standard of review.

The only case Petitioner cites in which a trial court's decision to certify a class was reversed is *Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir., 1984), *cert. denied*, 470 U.S. 1028 (1985), a disparate treatment case in which the appeals court found that there was no evidence to support a finding that the officials who made the employment decisions concerning the challenged part of the class were motivated by racial prejudice. *Holsey* involved a challenge to a company's practices in hiring and promoting employees to sales and supervisory jobs. The trial court allowed the named plaintiffs, incumbents who had not been promoted, to represent outside applicants who had not been hired into the positions. The trial court had certified a class based on a finding that the company had applied entirely subjective criteria both to decisions as to whether or not to promote incumbents and as to whether or not to hire outside applicants. The appellate court, calling the question a "close" one, reversed. Since there was no evidence that the officials who made the outside hiring decisions were the same as those who made promotion or transfer decisions, it held that there was no evidence to support a finding that the officials who made the employment decisions concerning the challenged part of the class were motivated by racial prejudice.

In this case, by contrast, there was ample evidence to sustain the trial court's finding that the supervisors at the West plant did engage in racial discrimination in initial placement, pay, and layoff decisions. Indeed, the first two of these findings were unchallenged on appeal, and the third was sustained by the Fifth Circuit. Further, in this case supervisors and managers were transferred between the plants involved. Finally, as noted above, *Holsey* was exclusively a disparate treatment case, while this case also challenged the racially discriminatory impact of Petitioner's decision to leave all employment decisions to the unguided subjective discretion of its all-white supervisory force.

Holsey was decided almost a decade ago, and it has not been followed by a similar holding in the courts of appeal. If it does stand for the proposition that employment discrimination class actions may never cross inter-plant boundaries, it was undercut by this Court's later decision in *Bazemore v. Friday*, 478 U.S. 385, 405-406 (1986). In that case, the Court reversed a Fourth Circuit decision in a case in which the trial court had refused to certify a statewide class. The plaintiffs in *Bazemore* sought to represent a statewide class of black agricultural extension agents employed in different counties, in claims of salary and promotion discrimination, against the statewide agricultural extension service and a proposed defendant class of counties. The district court had refused to certify the plaintiff class, and the Fourth Circuit had affirmed, holding that the counties were largely autonomous in the setting of salaries and the selection of agents for promotion. The Supreme Court reversed the denial of class certification. In an opinion joined by all the members of the Court, it held that, even though individual counties were involved in the setting of salaries and in decisions on promotions, the plaintiffs' claims against the state extension service, a single defendant, were sufficient to create the requisite "typicality." This was so despite the fact, cited by Petitioner (Pet. 11), that practices in each individual county varied enough to make certification of a defendant class of counties inappropriate.

It is *Bazemore*'s holding as to the plaintiff class, not its holding as to the defendant class, that is relevant to this case.[5] There is a single defendant in this case. As regards that defendant, the named plaintiff's

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[5] As *Bazemore* illustrates, different considerations apply to the certification of classes of unrelated defendants than apply to the certification of plaintiff classes against a single defendant. *See also Thompson v. Board of Education, Romeo Community Schools*, 709 F.2d 1200 (6th Cir. 1983); *Paxman v. Campbell*, 612 F.2d 848 (4th Cir., 1980) (*en banc*), *cert. denied sub nom. Henrico County School Board v. Paxman*, 449 U.S. 1129 (1981); and *Henson v. Lincoln County Township*, 814 F.2d 410 (7th Cir., 1987), *cert. dismissed* ___ U.S. ___, 113 S.Ct. 1035 (1993) (holding Rule 23(b)(2) inapplicable to defendant classes).

claims are typical.[6] The discriminatory practices in this case were the result of the failure on the part of the corporate employer to promulgate a set of reasonably objective employment criteria and procedures. Whether Trinity chooses to assign internal blame for this failure to individual plant managers or to persons high on the corporate ladder does not detract from the commonality of the claims of blacks who were discriminated against because of it, any more than variations between counties negated the commonality of the questions of law or fact present in *Bazemore*.

3. The damages issue

The second of Petitioner's "questions presented" is phrased so as to ask the Court to decide whether a court may arbitrarily exclude some members of the class from receiving back pay, while providing a windfall recovery to others. If a court did that, it would plainly be wrong, but that is not what happened in this case.

Rather, Petitioner again simply disagrees with the method that the lower courts adopted for allocating damages in a case in which the underlying violation was the generalized use of wholly subjective criteria for job placement, compensation, promotion, and layoff decisions. According to Petitioner, the lower courts in such cases must calculate the total labor costs for all whites and all blacks, compute the difference, and then award each black worker in the class a share of that difference, regardless of whether that worker personally got less money than he would have received had he been white.

There are three problems with the position that the Petitioner is asking this Court to take. First, there is no disagreement in the lower courts on the question of how damages are to be allocated in a case of this nature. Second, the imposition of a rigid rule on all damage awards in such cases runs counter to the firmly-established proposition that methods of assessing damages in Title VII cases must be flexible. Finally, the rule Petitioner would have this Court propound violates the policy behind the remedy provisions of Title VII, which is to provide make-whole relief only to actual victims of discrimination.

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[6] While the *Bazemore* court phrased its holding in terms of "typicality," it is just as applicable to the question of commonality. As the Court noted in *Falcon, supra*, the two requirements "tend to merge." *Id.* at 158, n.13.

Petitioner does not claim that there is a conflict among the courts of appeal as to the proper method for computing damages in a case of this nature. It merely claims that the Fifth Circuit departed from its own precedent, *Pettway*, *supra*, and *United States v. United States Steel Corp.*, *supra*, in failing to adopt the *pro rata* remedy that Petitioner proposed. Even if the remedy in this case were inconsistent with these cases, such an intra-circuit conflict would be more appropriately resolved by the Fifth Circuit than by this Court. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

The development of a class-wide backpay award is a complex and difficult process, especially where subjective employment systems are involved. *See*, *e.g.*, *Pettway*, *supra*; *Stewart v. General Motors Corp.*, 542 F.2d 445, 452 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977). Decisions involving such remedies are necessarily very fact-intensive and case-specific, and the appellate courts have been reluctant to impose sweeping rules upon the district courts in this area. The most often-cited standards applied by the appellate courts in these cases are (1) that unrealistic exactitude is not required; and (2) that uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer. *Claiborne v. Illinois Central Railroad*, 583 F.2d 143, 149 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); *Pettway*, *supra*, 494 F.2d at 260-61; *Rios v. Enterprise Association Steamfitters, Local Union 638*, 860 F. 2d 1168, 1176 (2d Cir. 1988). Further, since the district courts are far closer to the facts of the cases than are the appellate courts, they have been granted wide discretion in resolving ambiguities. *United States Steel Corp.*, *supra*, 520 F.2d at 1050; *Stewart*, *supra*.

Thus, *Pettway*, the seminal case in this area, emphasized the flexibility that must be employed in developing a class-wide remedy ("[t]he method of calculating a class-wide back pay award must not be rigid," 494 F.2d at 260), and the case-specific nature of the issues involved. It cited several alternative approaches with approval, but made it clear that the district court was not limited to any one approach (*Id.* at 261-63); *see also United States v. United States Steel Corp.*, *supra* at 1056.

Though Petitioner is correct in pointing out that *pro rata* awards have been approved in some cases, the case-specific nature of each remedy cautions against the automatic application of that approach in every case. The cases in which such relief has been ordered are cases in which it has been necessary to apportion a limited number of vacancies among members of the class who were not hired or who

were denied promotions, each of whom was equally likely to have been placed in the vacancy. *Compare Ingram v. Madison Square Garden*, 709 F.2d 807, 812 (2d Cir.), *cert. denied*, 464 U.S. 937 (1983), and cases cited in the Petition at 15, *with Claiborne, supra.*

This case resembles *Claiborne*, rather than *Ingram* and the other cases cited by Petitioner, in that Petitioner's job categories were fungible, and blacks were assigned to lower-paying categories than equally-qualified whites. In *Claiborne*, the Fifth Circuit, noting that "the details of the approach must vary with the case." *Id.* at 149, rejected a *pro rata* remedy in favor of one which awarded each black claimant back pay for the denial of a position.

It is important to focus on the wrong that the back pay computation was designed to correct in evaluating the remedy the district court adopted. In this case, the *pro rata* approach advocated by Petitioner was properly rejected by the trial court as requiring a clear undercompensation of individuals harmed by Petitioner's discriminatory practices.

The remedy that the trial court adopted for the Petitioner's practice of placing blacks in lower-paying job categories than whites was, in effect, to bring the pay level of each black who was paid less than the average salary of equally-qualified whites up to that level. This is one of the approaches that the *Pettway* court cited with approval. *See also Stamps v. Detroit Edison Co.*, 365 F.Supp. 87, 116 (E.D.Mich. 1973), *rev'd on other grounds sub nom E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975) (to remedy the discriminatory assignment of blacks to low opportunity, unskilled jobs, each class member should be paid the difference between his actual earnings and the average earnings of workers in the high opportunity jobs); *United States v. Wood, Wire, & Metal Lathers International Union*, 328 F.Supp. 429 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir. 1973) (cited in *Pettway*, 494 F.2d at 262-63) (blacks discriminated against in referrals by a white union hiring hall awarded the difference between the average earnings of white union members, who had been referred, and the claimant's actual earnings). In fact, it is a standard procedure for computing damages in wage discrimination cases. *Rios, supra;*

Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1534 (11th Cir., 1992); *Jepsen v. Florida Board of Regents*, 754 F.2d 924 (11th Cir. 1985); *E.E.O.C. v. Liggett & Myers, Inc.*, 690 F.2d 1072 (4th Cir. 1982); *Love v. Pullman Co.*, 569 F.2d 1074 (10th Cir. 1978); *Danna v. New York Telephone Co.*, 755 F.Supp. 615 (S.D.N.Y. 1991); *E.E.O.C. v. Shelby County*, 707 F.Supp. 969, 987 (W.D.Tenn. 1988); *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F.Supp. 743 (W.D.Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977).

The policy behind the remedy of back pay in a Title VII case is to provide make-whole relief to those who have actually been harmed by discrimination. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-83 (1984); *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 474-75 (1986)(Opinion of Brennan, J.). The methodology that Petitioner urged the courts to use does not do this. Instead, in attempting to equalize amounts paid to different racial groupings of workers, it ignores the treatment of individuals. The courts below properly rejected Petitioner's approach in favor of an individualized remedy.

There was no evidence to justify a finding that the few black employees who were paid more than the average for whites with their qualifications were discriminated against in initial placement or pay. However, for the majority of the black employees, who were paid less than the best estimate of what they should have been paid, both the fact of discrimination and the measure of damages is clear. If the award to each of these class members is not equal to the difference between the best estimate of what he should have been paid and his actual wages, then he has not been made whole, and the central purpose of Title VII's remedial provisions has not have been served. *See Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

The remedy in this case did not depart from the principles set forth by this Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), or by the Fifth Circuit in *U.S. Steel Corp., supra*. These cases stand for the proposition that a court may not deny back pay to an entire class, after a finding that an employer discriminated against the class,

based on such reasons as good faith on the part of the employer, lack of unjust enrichment, or the availability of prospective injunctive relief. These two cases emphatically do not stand for the proposition that each and every member of a class must receive a back pay award, regardless of the circumstances of his or her own treatment at the hands of the employer. As the Court pointed out in *Albemarle*:

> "[w]hether a particular member of the plaintiff class should have been awarded any backpay and, if so, how much, are questions not involved in this review. Though at least *some* [emphasis supplied] of the members of the plaintiff class obviously suffered a loss of wage opportunities...the District Court decided that *no* backpay should be awarded to *anyone* in the class."

422 U.S. at 413.

Similarly, in *United States Steel Corp., supra*, the court of appeals reversed a decision to deny back pay to an entire class of discriminatees. However, as the Petitioner acknowledged (Pet. 14), the court left open the possibility that *some* class members would not receive back pay, if it could be shown that they earned at least as much as comparable whites ("Defendant would have to show convincingly...that a given group of discriminatees outearned, or at least earned as much as, a plant-seniority-comparable group of whites during the discriminatory period," *Id.*, 520 F.2d at 1054).

The district court in this case clearly articulated its criteria for awarding back pay to class members. It used the best available estimate of their individual damages, and awarded damages based on that estimate to class members who could be shown to have suffered economic harm. The Fifth Circuit's affirmance of the remedy is fully consistent with its own precedent and with previous decisions of this

Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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